81-2310

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IN THE

Supreme Court of the United States

OCTOBER TERM 1982

NO. _____

THOPHAUS ELLERBE,
Petitioner

v.

OTIS ELEVATOR COMPANY,
Respondent

On Appeal From Texas Court Of Civil Appeals
First Supreme Judicial District Of Texas

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether Article 5536(a) of the Texas Revised Civil Statutes is violative of the equal protection and due process clauses of the 14th Amendment to the Constitution of the United States.

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NO. _____

THOPHAUS ELLERBE,
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v.

OTIS ELEVATOR COMPANY,
Respondent

On Appeal From Texas Court Of Civil Appeals
First Supreme Judicial District Of Texas

JURISDICTIONAL STATEMENT

INTRODUCTION

Thophaus Ellerbe, Appellant, appeals from the final judgment of the Supreme Court of Texas dated February 3, 1982, and from that Court's Order of March 24, 1982 overruling the Motion for Rehearing. That judgment upheld the decision of the First Court of Civil Appeals which held that Article 5536(a) of the Texas Revised Civil Statutes was not violative of the 14th Amendment to the United States Constitution.

OPINIONS BELOW

The Supreme Court of the State of Texas affirmed the decision of the Court of Civil Appeals in Cause No. 17939 on February 3, 1982. The Motion for Rehearing filed in the Texas Supreme Court was overruled on March 24, 1982. The opinion of the Court of Civil Appeals appears in the Appendix hereto.

JURISDICTION

The judgment of the Texas Supreme Court, denying Appellant relief against Appellee Otis Elevator Inc., was entered on February 3, 1982. A Motion for Rehearing was denied on March 24, 1982. See Appendix, infra.

This appeal is being docketed in this court within 90 days from the denial of rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

QUESTION PRESENTED

Whether Tex. Rev. Civ. Stat. Ann. Art. 5536a, § 1 and § 2 (Vernon Supp. 1980) is violative of the equal protection and due process clauses of the 14th Amendment to the Constitution of the United States. That statute provides:

> Art. 5536a. Architects, engineers and persons performing or furnishing construction or repair of improvement to real property
>
> Section 1. There shall be commenced and prosecuted within ten years after the substantial completion of any improvement to real property or the commencement of operation of any equipment attached to real property, and not afterward, all actions or suits in court for damages for any injury,

damages or loss to property, real or personal, or for any injury to a person, or for wrongful death, arising out of the defective or unsafe condition of any such real property or any equipment or improvement attached to such real property, for contribution or indemnity for damages sustained on account of such injury, damage, loss or death against any registered or licensed engineer or architect in this state performing or furnishing the design, planning, inspection of construction of any such improvement, equipment or structure or against any such person so performing or furnishing such design, planning, inspection of construction of any such improvement, equipment, or structure; provided, however, if the claim for damages, contribution or indemnity has been presented in writing to the registered or licensed engineer or architect performing such services within the ten-year period of limitation, said period shall be extended to include two years from the time such notice in writing is presented.

Sec. 2. There shall be commenced and prosecuted within ten years after the substantial completion of any improvement to real property, and not afterward, all actions or suits in court for damages for any injury, damages, or loss to property, real or personal, or for any injury to a person, or for wrongful death, or for contribution or indemnity for damages sustained on account of such injury, damage, loss, or death arising out of the defective or unsafe condition of any such real property or any deficiency in the construction or repair of any improvements on such real property against any person performing or furnishing construction or repairs of any such improvement; provided, however, if the claim for damages, contribution or indemnity has been presented in writing to the person performing such services within the ten-year period of limitation, said period shall be extended to include

two years from the time such notice in writing is presented, or if said injury, damage, loss, or death occurs during the tenth year, all actions or suits in court may be brought within two years from the date of such injury, damage, loss, or death; and provided further, however, this section shall not apply and will not operate as a bar to an action or suit in court (a) on a written warranty, guaranty, or other contract which expressly is effective for a period in excess of the period herein prescribed; (b) against persons in actual possession or control of the real property as owner, tenant, or otherwise at the time the injury, damage, loss, or death occurs; or (c) based on willful misconduct or fraudulent concealment in connection with the performing or furnishing of such construction or repair. Nothing in this section shall be construed as extending or affecting the period prescribed for the bringing of any action under Articles 5526, 5527, and 5529, Revised Civil Statutes of Texas, 1925, or any other law of this state.

CONSTITUTIONAL PROVISIONS

14th Amendment, United States Constitution:

Section 1. . . . No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Section 1. . . . nor shall any state deprive any person of life, liberty, or property, without due process of law;

RAISING THE FEDERAL QUESTION

Defendant Otis Elevator Company filed a Motion for Summary Judgment in the District Court of Harris County, Texas, 215th Judicial District. The basis of its Motion was that Article 5536(a), Vernon's Texas Civil Statutes,

provided a "statute of limitations" which barred this claim. At the earliest possible time, Appellant raised the claim that Article 5536(a) was repugnant to the 14th Amendment to the United States Constitution, in his Response to the Motion for Summary Judgment.

This 14th Amendment claim was reiterated by Appellant before the Court of Civil Appeals in Cause No. 17939. The trial court's decision was affirmed. In due time thereafter, Appellant presented his Motion for Rehearing to the Court of Civil Appeals which was overruled on the 23rd day of July, 1981.

This 14th Amendment claim was again reiterated by Appellant before the Supreme Court of Texas. There he renewed his contention that Article 5536(a) was repugnant to the Constitution of the United States. The Texas Supreme Court overruled the renewed objection and further overruled the Motion for Rehearing.

STATEMENT OF THE CASE

This is a suit for wrongful death and survival damages arising from the death of Appellant's son, Kenneth Allen Ellerbe, on October 19, 1973, in Houston, Harris County, Texas. Kenneth Ellerbe died when he fell down an open elevator shaft in the Gulf Building in Houston, Texas. Plaintiff brought suit against Otis Elevator Company, alleging that the accident was caused by the defective design of the Otis Elevator which had been designed, manufactured and sold by the Defendant. The specific defect alleged was that the elevator could be moved without a key from floor to floor, leaving the doors to the elevator shaft open on each floor.

On September 4, 1980, Otis Elevator Company filed its Motion for Summary Judgment relying solely on Article 5536(a) of the Texas Revised Civil Statutes. This statute, passed in 1969 and amended in 1975, purports to prohibit the filing of any claim against specified classes of defendents for injury or death arising out of the condition of improvements to real property unless such claim is filed within 10 years after substantial completion of the improvements. It is undisputed that the elevator was installed in the Gulf Building more than ten years prior to the date of Kenneth Ellerbe's death.

The summary judgment on behalf of Otis Elevator Company was granted by the 215th Judicial District Court of Harris County, Texas. Appellant timely perfected his appeal from the granting of the summary judgment. After the Court of Civil Appeals affirmed the trial court's decision and denied Appellant's Motion for Rehearing, Petitioner timely filed his Application for Writ of Error with the Supreme Court of the State of Texas. Such application was refused by the Supreme Court of Texas, which indicated there was "no reversible error" in the decision of the Court of Civil Appeals. Motion for Rehearing was timely filed in the Supreme Court of Texas and was denied on March 24, 1982.

THE QUESTION IS SUBSTANTIAL

This appeal raises the serious and substantial question of the constitutionality of a statute which provides that after a limited and arbitrary period of time, certain specially favored groups, including architects, engineers, and contractors, shall not be subject to claims for damages for personal injuries or death caused by negligence in

their work or defects in the products they supplied to be installed in premises.

(1) Equal Protection

The statute in question, which deprives citizens of their substantial rights, is clearly violative of the 14th Amendment to the Constitution of the United States which provides as follows:

> Section 1. . . . No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.

This clause, which guarantees equal protection of the law, prohibits legislation which discriminates with no valid distinction against some persons while favoring others. Equal protection requires a law to operate equally and uniformly on all persons situated in similar circumstances. *Douglas v. California*, 372 U.S. 353 (1963).

The statute under consideration, Tex. Rev. Civ. Stat. Ann. Article 5536(a) (Vernon's Supp. 1980), grants special immunity from suit to architects, engineers, and a limited class of others engaged in the construction industry but denies such protection to those similarly situated, such as owners and materialmen. The courts have previously held that state legislation which singles out some claims without a reasonable basis and provides a shorter statute of limitations for them than other claims constitutes a denial of equal protection. *Davis v. Rockton, and Rion R.R.*, 65 F.Supp. 67 (D.S.C. 1946). Another special statute of limitations was declared a denial of equal protection by the Eighth Circuit Court of Appeals:

> Here, the state has singled out federal claims or causes of action as such and has prescribed a shorter period of limitation for the bringing of such actions than that prescribed for the bringing of similar actions arising or based upon other than federal laws. The statute violates Article VI of the Constitution in that it "discriminates against rights arising under federal laws." Its enforcement would result in denying to those seeking to assert such claims, the equal protection of the law. Fourteenth Amendment, Constitution, Section 1.
>
> Equal protection of the law in its constitutional sense implies that all litigants similarly situated may appeal to the courts for relief under like conditions and without discrimination. *Republic Pictures Corporation v. Kappler*, 151 F.2d 543 (8th Cir. 1945). Affirmed, 66 S.Ct. 523, 327 U.S. 757, 90 L.Ed. 991, rehearing denied, 66 S.Ct. 804, 327 U.S. 817, 90 L.Ed. 1040. (Citations omitted).

The effect of Article 5536(a) is to deny some litigants access to the courts for relief while access is still permitted to other litigants similarly situated. As an example, consider the hypothetical case of two men injured on the same day while working within an industrial facility; the first injured in an elevator which had been installed in the building twenty years before the accident; the second injured by a defect in a machine which had been placed on the floor of the building on the same day that construction was completed but not permanently affixed. Both the elevator and the machine are products designed to be mass produced and sold to various industries. Both were installed on the same day, the only difference being that one was permanently attached to the building, and the other was simply set in place. If both injuries were caused

by a design defect in the products, there is absolutely no rational difference between the man injured by the elevator and the man injured by the machine. Yet, one has a cause of action for his injuries against the manufacturer of the machine, while the other is denied any cause of action against the manufacturer of the elevator because of Article 5536(a). These men are members of the same class, yet are denied equal rights in violation of the equal protection guarantees of the United States Constitution.

The two manufacturers of the elevator and the machine are also members of the same class, since the mere fact that the elevator was permanently affixed to the building does not constitute any reasonable or rational distinction between the two. Both manufactured machines designed to be used in one location for many years. Yet one manufacturer is subject to liability for his defective design, whereas the other is protected by Article 5536(a). This is a clear violation of the equal protection requirement of the United States Constitution, as held by the Eighth Circuit in *Kappler* and affirmed by this Court.

The courts of numerous states have held similar statutes to be arbitrary and capricious denials of equal protection and therefore unconstitutional: *Skinner v. Anderson*, 231 N.E.2d 588 (Ill. 1967); *McClanahan v. American Gilsonite Company*, 494 F.Supp. 1334 (D. Colo. 1980); *Phillips v. ABC Builders, Inc.*, 611 P.2d 821 (Wyo. 1980); *Broome v. Truluck*, 241 S.E.2d 739 (S.C. 1978); *Pacific Indemnity Company v. Thompson-Yaeger, Inc.*, 260 N.W.2d 548 (Minn. 1977); *Loyal Order of Moose, Lodge 1785 v. Cavaness*, 563 P.2d 143 (Okla. 1977); *Kallas Millwork Corporation v. Square D Company*, 225 N.W.2d 454 (Wis. 1975); *Overland Construction Com-*

pany v. Sirmons, 369 So.2d 572 (Fla. 1979); *Fujioka v. Kam*, 514 P.2d 568 (Haw. 1973); *Saylor v. Hall*, 497 S.W.2d 218 (Ky. 1973); and *Bagby Elevator & Elec. Co. Inc. v. McBride*, 291 So.2d 306 (Ala. 1974).

(2) Due Process

The 14th Amendment to the United States Constitution guarantees that no state shall deprive a citizen of his property except by due process of law.

> . . . nor shall any state deprive any person of life, liberty, or property without due process of law;

Appellant's cause of action in this case is based upon negligence, a concept deeply rooted in the common law, and is one for wrongful death, a cause of action specifically established by Article 4671, Texas Revised Civil Statutes. The effect of Article 5536(a) is to arbitrarily withdraw all legal remedies from the Appellant in this case for a cause of action which is well established both in the common law and by statute.

Such an arbitrary and capricious withdrawal of legal rights clearly violates the due process clause of the 14th Amendment to the United States Constitution. This vested right to protection by the tort law of the state is as much a property right as the entitlement to welfare assistance or to a governmental position, property rights which have both been granted protection by the United States Supreme Court. *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Greene v. McElroy*, 360 U.S. 474 (1959).

Various state courts have declared similar statutes unconstitutional on due process as well as equal protection

grounds. The first state to declare its statute arbitrary and unconstitutional was Illinois, in the case of *Skinner v. Anderson*, 231 N.E.2d 588 (Ill. 1967). In 1973, both Kentucky and Hawaii declared their statutes unconstitutional. The Supreme Court of Hawaii found that this statute violated the equal protection guarantees of both Hawaii and the United States Constitutions:

> It is clear that the classification does not rest upon some reasonable consideration of differences (between the classes under the same circumstances), which have a fair and substantial relation to the object of the legislation. Nor is the classification founded upon a reasonable distinction or difference necessitated by state policy. A statute making such an unsupportable classification fails to meet the requirements of the equal protection guaranty. *Fujioka v. Kam*, 514 P.2d 568, 571 (Haw. 1973).

In 1975, the Supreme Court of Wisconsin considered the constitutionality of a similar statute which had been passed by the Wisconsin legislature. The court found that the statute granted special and unusual immunities to a limited class:

> It seems, therefore, that there is little rational justification for the statute in the traditional terms by which statutes of limitation are judged. The effect here is to give special and unusual immunities to the class referred to in the statute as persons "performing or furnishing the design, planning, supervision of construction or construction of such improvement to real property." *Kallas Millwork Corporation v. Square D Company*, 225 N.W.2d 454 (Wis. Sup. 1975).

The Wisconsin Court also found the statute to be a violation of the equal protection guarantees of the Wisconsin and United States Constitutions:

> We find the rationale of *Skinner* and *Fujioka* persuasive and applicable to the interpretation of Section 893.115, Stats., and the facts of this case. We adopt their position and conclude that the legislative classification that gives special protection to the protected group is unreasonable. *Kallas Millwork Corp.*, at p. 459.

In 1977, the Supreme Court of Oklahoma considered a similar statute, and found that it violated the equal protection guarantees of the Fourteenth Amendment to the United States Constitution. *Loyal Order of Moose, Lodge 1785 v. Cavaness*, 563 P.2d 143 (Okla. Sup. 1977).

Minnesota also found its statute unconstitutional in 1977, reasoning as follows:

> Legislative classifications must apply uniformly to all persons who are similar situated, and the distinction which separates those who are included within a classification from those who are not must be natural and reasonable, not fanciful and arbitrary. It appears that the statute contravenes this prohibition in that it grants a special immunity to persons within its terms, without a rational basis for regarding those persons as a distinct and separate class. *Pacific Indemnity Company v. Thompson-Yaeger*, 260 N.W.2d 548 (Minn. Sup. 1977).

In 1978, the Michigan Court of Appeals considered the constitutionality of a similar statute, and reached the "inescapable conclusion" that the statute was arbitrary

and without reasonable relation to the object of the legislation, and violated equal protection. *Muzar v. Metro Town Houses, Inc.*, 266 N.W.2d 850 (Mich. App. 1978). South Carolina, in 1978, and Florida in 1979, also declared their statutes unconstitutional. *Broome v. Truluck*, 270 S.C. 227, 241 S.E.2d 739 (1978); *Overland Construction Co., Inc. v. Sirmons*, 369 So.2d 572 (Fla. Sup. 1979).

A recent court to consider the constitutionality of this type of statute was the Supreme Court of Wyoming which held in 1980 that the statute was unconstitutional on numerous grounds:

> We hold that the statute in question, Section 1-3-111, supra, is not a statute of limitations but is a grant of immunity from suit. This immunity is conferred only on a narrow spectrum of defendants. We hold there is no rational or reasonable justification for granting this immunity to this limited class of persons. Further, we hold that the statute is a special law at least to the extent that no special law can be enacted where a general law can be made applicable. In this instance a general law can be made applicable. Wyoming Constitution, Section 8, Article I, and Section 27, Article III, supra. Moreover, the statute operates so as to close the courts to individuals who have had dealings with the protected class in violation of Wyoming Constitution, Section 8, Article I, supra.
>
> In summary, the statute, both in theory and application, is totally inconsistent with the spirit and letter of our State Constitution. For this reason, there is no need to express any views with regard to a violation of the Fourteenth Amendment of the U.S. Constitution. *Phillips v. ABC Builders, Inc.*, 611 P.2d 821 (Wyo. Sup. 1980).

The issue presented by this appeal is of substantial importance to the courts and legislatures of every state. Forty-eight states have passed statutes substantially similar to the Texas statutes under consideration. (See Appendix A-1). The courts of eleven of those states have declared their statutes unconstitutional, while the courts of thirteen states have upheld their statutes in the face of constitutional challenge.

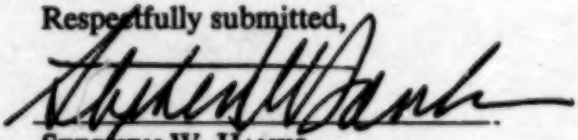
Litigation arising from personal injury and death is ever increasing, and this sharply divided issue affects the lives of the citizens of every state. The result is that a person such as Mr. Ellerbe may be capriciously denied any compensation for the unnecessary death of his son depending on whether he lives in a jurisdiction which has declared this type of statute to be unconstitutional or not.

In view of the sharp division among the several states on the constitutionality of this legislation, this Court should permit the issue to be fully briefed by the parties and argued so that it may be finally settled. It is difficult to imagine an issue involving more widespread legislation or greater disagreement on the constitutionality of such legislation than is now before the Court. This case presents a constitutional question which involves the legislation of 48 states, has already required decisions from the higher courts of 24 states, and affects the lives of substantial numbers of citizens who have suffered or will in the future suffer injuries to themselves or the loss of or injury to a family member.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal, should permit the parties to fully brief and argue the issue, and should finally resolve the question of the constitutionality of this statute.

Respectfully submitted,



STEPHEN W. HANKS
Counsel for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of June, 1982, three copies of this Jurisdictional Statement were mailed, by first class mail, postage prepaid, to Alice Giessel, Talbert, Giessel & Stone, 914 Main at Walker, Houston, Texas, 77002, counsel for Respondent. I further certify that all parties required to be served have been served.

STEPHEN W. HANKS

APPENDIX

Statute Declared Unconstitutional	Statute Declared Constitutional	No Decision
Alabama		
		Alaska
		Arizona
	Arkansas	
		California
Colorado		
		Connecticut
		Delaware
Florida		
		Georgia
Hawaii		
		Idaho
Illinois		
		Indiana
		Kansas
Kentucky		
	Louisiana	
		Maine
		Maryland
		Massachusetts
	Michigan	
Minnesota		
		Mississippi
		Missouri
	Montana	
		Nebraska
		Nevada
		New Hampshire
	New Jersey	
	New Mexico	
		New York
		North Carolina
		North Dakota
		Ohio

Statute Declared Unconstitutional	Statute Declared Constitutional	No Decision
Oklahoma		
	Oregon	
	Pennsylvania	
		Rhode Island
South Carolina		
		South Dakota
	Tennessee	
	Texas	
	Utah	
		Vermont
	Virginia	
	Washington	
Wisconsin		
Wyoming		

Iowa and West Virginia have no comparable statute.

NO. 1,040,322

IN THE DISTRICT COURT OF
HARRIS COUNTY, TEXAS
215TH JUDICIAL DISTRICT

THOPHAUS M. ELLERBE

v.

OTIS ELEVATOR COMPANY

FINAL SUMMARY JUDGMENT

BE IT REMEMBERED that on the 21st day of November, 1980, came on for consideration Defendant OTIS ELEVATOR COMPANY'S Motion for Summary Judgment, the parties having appeared by and through their respective counsel, and the Court having examined the pleadings and summary judgment evidence and having heard the arguments of counsel, finds that Defendant, OTIS ELEVATOR COMPANY, is entitled to a summary judgment in its favor and that its Motion should be granted.

It is therefore, ORDERED, ADJUDGED and DECREED that Plaintiff, THOPHAUS M. ELLERBE, take nothing against Defendant, OTIS ELEVATOR COMPANY, and that Defendant recover all costs in its behalf expended of and from Plaintiff, THOPHAUS M. ELLERBE, for which let execution issue.

SIGNED this 21st day of November, 1980.

/s/ WILLIAM W. KILGARLIN
Judge presiding

APPROVED AS TO FORM:

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(SEAL)

COPY OF JUDGMENT

NO. 17939

THOPHAUS ELLERBE

vs.

OTIS ELEVATOR COMPANY

Appeal from District Court of Harris County.
(Tr. Ct. #1,040,322)
Opinion delivered by Chief Justice Coleman,
Justices Peden and Smith sitting.

This cause, being an appeal from the judgment rendered and entered by the court below on November 21, 1980, came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, it is therefore considered, adjudged and ordered that the judgment of the court below be in all things affirmed; that the appellant, Thophaus Ellerbe, and his surety LAWYERS SURETY CORPORATION, pay all costs incurred by reason of this appeal. It is further ordered that this decision be certified below for observance.

Judgment rendered by panel consisting of Chief Justice Coleman and Justices Peden and Smith.

Affirmed and opinion filed June 11, 1981.

NO. 17939

THOPHAUS ELLERBE, APPELLANT

vs.

OTIS ELEVATOR COMPANY, APPELLEE

Appeal from the 215 Judicial Court
of Harris County, Texas

This is a suit for wrongful death and survival damages arising from the death of plaintiff's son, Kenneth Allen Ellerbe, on October 19, 1973, in Harris County, Texas. The suit is based on the alleged defective design of the Otis elevator which had been designed, manufactured, and sold by the defendant. The trial court granted a motion for summary judgment which relied solely on Article 5536a, Texas Revised Civil Statutes Annotated, (Vernon Supp. 1980). This statute prohibits the filing of any suit for damages arising out of the defective or unsafe condition of real property or any equipment or improvement attached to such real property ten years after the substantial completion of the improvement "against any registered or licensed engineer or architect in this state performing or furnishing the design, planning, inspection of construction of any such improvement, equipment or structure or against any such person so performing or furnishing such design, planning, inspec-

tion of construction of any such improvement, equipment, or structure." Tex. Rev. Civ. Stat. Ann. Art. 5536a, § 1 (Vernon Supp. 1980). The statute further provides that:

> There shall be commenced and prosecuted within ten years after the substantial completion of any improvement to real property, and not afterward, all actions or suits in court for damages . . . for wrongful death . . . arising out of the defective or unsafe condition of any such real property or any deficiency in the construction or repair of any improvements on such real property against any person performing or furnishing construction or repair of any such improvement; provided, . . . this section shall not apply and will not operate as a bar to an action or suit in court . . . (b) against persons in actual possession or control of the real property as owner, tenant, or otherwise at the time . . . the death occurs; . . . .

Id. § 2.

The plaintiff has raised two points of error: (1) the trial court erred in granting a summary judgment in favor of defendant because a fact issue exists as to whether the defendant retained control over the elevator as provided by Section 2 of Article 5536a; (2) the trial court erred in granting a summary judgment on behalf of the defendant because said Article 5536a violates provisions of the Texas and United States Constitutions.

Summary judgment evidence establishes that Kenneth Ellerbe died when he fell down an open elevator shaft in the Gulf Building in Houston, Texas. Plaintiff alleged that the accident was caused by the defective design of the Otis elevator because it could be moved without a

key from floor to floor, leaving the doors to the elevator shaft open on each floor. There was summary judgment evidence that the elevator was designed by registered engineers and architects employed by Otis Elevator Company. There was also evidence that the elevator was installed in the Gulf Building in 1928.

The first question to be determined is whether the elevator company is entitled to the protection of the statute. Section 1 affords protection to "any registered or licensed engineer or architect in this state" performing or furnishing the design, planning or inspection of construction of equipment or improvements attached to real property. It also protects "any such person" under the same circumstances.

When we consider the entire Act it appears that only registered or licensed engineers or architects are protected under Section 1. Article 5536a was first enacted by the 61st Legislature in 1969. Tex. Laws 1969, ch. 418, § 1, at 1379. The title of that Act refers to any registered or licensed engineer or architect, and the emergency clause refers to registered or licensed engineers or architects only. While some meaning must be given to the words "any such person," we consider that it broadens the protection by affording it to engineers or architects licensed or registered in states other than Texas. Our conclusion is reinforced by the fact that a proviso attached to Section 1 of the Act extends the ten-year period within which the cause of action must be initiated in cases where a claim for damages, contribution or indemnities is presented in writing "to the registered or licensed engineer or architect performing such services."

Article 5536a, was amended by adding Section 2 extending the protection of the Act to "any person" performing or furnishing construction or repair of any improvements on real property. Tex. Laws 1975, ch. 269, § 1, at 649. An elevator in a multi-storied building obviously constitutes an improvement on real property. The manufacturer of the elevator would be a person performing or furnishing construction of the elevator even though it did not install it in the building.

The appellant contends that since the Otis Elevator Company offered repair services for elevators which it manufactured, maintained an office in connection therewith in the City of Houston, and also kept a record in its office concerning this particular elevator, it comes within the provision:

> [T]his section shall not apply and will not operate as a bar to an action or suit in court . . . (b) against persons in actual possession or control of the real property as owner, tenant, or otherwise at the time . . . the death occurs; . . . .

Art. 5536a, § 2.

The evidence fails to raise a question of fact as to whether the elevator company is in "actual possession or control of the real property." There is no evidence that the elevator was being repaired at the time of the accident. Section 2 of Article 5536a is a sufficient basis for the summary judgment in favor of the Otis Elevator Company.

Ellerbe contends that Article 5536a violates certain provisions of the Texas and of the United States Constitutions. He cites sections 3, 13, 17, and 19 of Article

1 of the Texas Constitution and the Fourteenth Amendment to United States Constitution.

Section 13 of Article 1 provides, in part, that all courts shall be open to every person for an injury done him, in lands, goods, or personal reputation, and that they shall have remedy by due course of law. Tex. Const. art. I, § 13. This Section of the Constitution does not create any new right, but is a declaration of a general fundamental principle that for such wrongs as are recognized by the law of the land, the courts shall be open and afford a remedy. In the interest of D____M____N____, a child, 570 S.W.2d 493, 498 (Tex. Civ. App.—Texarkana 1978, no writ). This section has been held to prohibit legislative bodies from arbitrarily withdrawing all legal remedies from one having a cause of action well established and well defined in the common law. Lebohm v. City of Galveston, 154 Tex. 192, 275 S.W. 2d 951 (1955).

Since this is a suit for wrongful death based upon negligence, plaintiff asserts, the legislature may not arbitrarily withdraw all legal remedies. However, it is settled that a right, to be within the protection of the Constitution, must be a vested right or something more than a mere expectancy based upon an anticipated continuance of an existing law. City of Dallas v. Trammel, 129 Tex. 150, 101 S.W.2d 1009 (1937). Neither the Constitution of the United States nor of this State forbids the abolition of common law rights of action in order to attain a permissible legislative object. Silver v. Silver, 280 U.S. 117 (1929); Aetna Insurance Company v. Richardelle, 528 S.W.2d 280 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.).

Article 5536a was enacted long prior to the date of the accident giving rise to this suit. Its enactment did not violate a vested right of the plaintiff. Due process of law was not denied the plaintiff by the application of Article 5536a to his cause of action based on negligence.

The Eastland Court of Civil Appeals has rejected the contention that Article 5536a is unconstitutional as violative of due process and equal protection rights. Hill v. Forrest & Cotton, Inc., 555 S.W.2d 145 (Tex. Civ. App. —Eastland 1977, writ ref'd n.r.e.). There is conflict in out-of-state authority concerning the constitutionality of similar statutes. See Annot., 93 A.L.R. 3rd 1242 (1979). Article 1, § 2 of the Texas Constitution guarantees to all persons equality of rights. This provision was designed to prevent any person or class of persons from being singled out as a special subject for discriminating or hostile legislation. The legislature may adopt any classification it sees fit provided there is a reasonable basis therefor. Classifications must be based on a real and substantial difference, relating to the subject of the particular enactment. If there is a reasonable ground for the classification and the law operates equally on all within the same class, it will be held valid. Friedman v. American Surety Co. of New York, 137 Tex. 149, 151 S.W.2d 570 (1941); Burroughs v. Lyles, 142 Tex. 704, 181 S.W.2d 570 (1944). In passing upon the constitutionality of a classification, the test to be applied by courts is whether the classification is essentially arbitrary, unreasonable, and not based upon reality. American Transfer & Storage Co. v. Bullock, 525 S.W.2d 918 (Tex. Civ. App.—Austin, 1975, writ ref'd).

The Texas Statute applies to architects, engineers, and "any person" performing or furnishing construction or repair of any improvement to real property. It excludes from its protection persons in possession or control of real property, such as owners, lessors, and tenants. We do not determine whether materialmen come within the statutory language. Even though they may be excluded, we find the Statute constitutional since such exclusion would be founded on a valid distinction. The distinctions have been discussed in various decisions of courts of other states, some finding them valid, and others reaching an opposite conclusion. We are in general agreement with the reasoning of the Louisiana Supreme Court in Burmaster v. Gravity Drainage Dist. No. 2, 366 So.2d 1381 (La. 1978). Other cases which we have found persuasive are Carter v. Hartenstein, 248 Ark. 1172, 455 S.W.2d 918 (1970), Freezer Storage Inc. v. Armstrong Cork Company, 382 A.2d 715 (Pa. 1978); Howell v. Burk, 90 N.M. 688, 568 P.2d 214 (1977) and Rosenberg v. Town of North Bergen, 61 N.J. 190, 293 A.2d 662 (1972).

The judgment is affirmed.

/s/ TOM F. COLEMAN
Chief Justice

Justices Peden and Smith also sitting.

Judgment rendered and opinion filed June 11, 1981.

IN THE
SUPREME COURT OF TEXAS

NO. C-669

February 3, 1982

THOPHAUS ELLERBE

v.

OTIS ELEVATOR COMPANY

From Harris County, First District.

Application of petitioner for writ of error to the Court of Civil Appeals for the First Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, Thophaus Ellerbe and his surety Lawyers Surety Corporation, pay all costs incurred on this application.

March 24, 1982

NO. C-669

THOPHAUS ELLERBE

v.

OTIS ELEVATOR COMPANY

From Harris County, First District.

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this, the 22nd day of April, 1982.

GARSON R. JACKSON, Clerk

By: /s/ RICHARD P. BRAUN, Deputy
Richard P. Braun

(SEAL)

IN THE SUPREME COURT OF TEXAS

C-669

THOPHAUS ELLERBE,
Appellant,

v.

OTIS ELEVATOR COMPANY
Appellee.

NOICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that Thophaus Ellerbe, the appellant above-named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Texas issued February 3, 1982, and from the denial of Appellant's Motion for Rehearing entered March 24, 1982.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted this _____ day of April, 1982.

/s/ STEPHEN W. HANKS
Stephen W. Hanks
Counsel for Appellant

HELM, PLETCHER & HOGAN
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(713) 654-4464

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing instrument was mailed this the 21st day of April, 1982, to all counsel of record, by certified mail, return receipt requested, or hand delivery, and that the original of said instrument was filed in the office of the Clerk of the Supreme Court of the State of Texas.

/s/ STEPHEN W. HANKS
Stephen W. Hanks